80-2114

Office Supreme Court, U.S.
FILED
JUN 9 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL LOCHIATTO, CHERYL ROGERS A/K/A CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME, ANTHONY BATTISTA,
Petitioners,

vs.

STATE OF FLORIDA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
FOURTH DISTRICT COURT OF APPEALS
FOR THE STATE OF FLORIDA

ROBERT EUGENE SMITH
16133 Ventura Boulevard
Penthouse Suite E
Encino, California 91436
Attorney for Petitioners

Of Counsel:
BRUCE L. RANDALL
4902 North Federal Highway, Suite 480
Ft. Lauderdale, Florida 33308

QUESTIONS PRESENTED

1. Is the Florida Obscenity Statute, F.S.A. 847.07(4)(c) as written and/or as the same may have been authoritatively construed, unconstitutional for impermissibly chilling the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States and thus void of vagueness and overbreadth for failing to conform to the minimum standards set forth by this Court in *Miller v. California,* (1973) 423 U.S. 15?

2. Does a state statute which has been construed to define "scienter" or "knowing" the "contents and the nature and character" of the press materials charged as violative of the Florida Obscenity Statute, F.S.A. 847.07(4)(c) in a manner authorizing obscenity convictions on mere "constructive knowledge, violates Petitioners' due process rights and impermissibly chill the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States?

3. Were the procedures employed by law enforcement officials violative of Petitioners' First, Fourth, Fifth and Fourteenth Amendment rights where as here, the issuance of the Search Warrant by the Magistrate did not focus searchingly on the question of obscenity, and where as here, a mass warrantless seizure of approximately three hundred (300) additional sexually oriented films was made in violation of the teachings of Walter v. U.S., _____ U.S. _____ 100 S. Ct. 2395 (1980), and where as here, the "fruit" of the "poison" tree was introduced in evidence on the issue of scienter?

INDEX

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING WRIT –

I. The Florida Obscenity Statute, F.S.A. 847.07(4)(c) as written and/or as the same may have been authoritatively construed, unconstitutional for impermissibly chilling the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States and thus void of vagueness and overbreath for failing to conform to the minimum standards set forth by this court in *Miller v. California* (1973) 423 U.S. 15 4

II. A state statute which has been construed to define "scienter" or "knowing" the "contents and the nature and character" of the press materials charged

as violative of the Florida Obscenity Statute, F.S.A. 847.01(4)(c) in a manner authorizing obscenity convictions on mere "constructive" knowledge, violates Petitioners' due process rights and impermissibly chill the dissemination of press materials protected under the First and Fourteenth Amendments to the Constitution of the United States 12

III. The procedures employed by law enforcement officials were violative of Petitioners' First, Fourth, Fifth and Fourteenth Amendment rights where as here, the issuance of the Search Warrant by the Magistrate did not focus searchingly on the question of obscenity, and where as here, a mass warrantless seizure of approximately three hundred (300) additional sexually oriented films was made, in violation of teachings of *Walter v. U.S.*, 100 S. St. 2395 (1980), and where as here, the "fruit" of the "poison" tree was introduced in evidence on the issue of scienter 19

CONCLUSION 30

APPENDIX A A-1

APPENDIX B A-2

APPENDIX C A-3,A-4

TABLE OF CITATIONS

Cases

ABC Interstate Theaters, Inc. v. State,
325 S.2d 123 (Miss. 1976) 10
Aquilar v. Texas, 378 U.S. 108 25
Art Theater Guide, Inc. v. State, 510 S.W.2d
258 [Tenn.] (1974) 10
Bantam Books, Inc. v. Sullivan, 372 U.S. 58,
83 Sup. Ct. 631 (1963) 4
Brinegar v. United States, 338 U.S. 160 24
Brown v. Louisiana, 383 U.S. 131,
86 Sup. Ct. 719 (1966) 4
Campagno v. State, 323 So.2d 671 (Fla. App. 1978) 17
John Cleland's "Memoirs of a Woman of Pleasure" v.
Commonwealth of Massachusetts, 383 U.S. 413,
886 Sup. Ct. 975 (1966) 5
Coates v. Cincinnati, 402 U.S. 611, 81 Sup. Ct. 1686 (1971) . 7
Cohen v. California 403 U.S. 16, 9 Sup. Ct. 1780,
29 L.Ed.2d 284 (1971) 8
Commonwealth v. Claflin, 298 N.E.2d 888
[Mass.] (1973) 9
Commonwealth v. Horton, 310 N.E.2d 316
[Mass.] (1973) 10
Commonwealth v. MacDonald, 347 Atl.2d 290 (Pa. 1975) ... 10
Commonwealth v. Rosenburg, 398 N.E.2d 451 15,17
Commonwealth v. Thureson, 357 N.E.2d 750
(Mass. 1976) 17
Connally v. General Construction Company,
269 U.S. 385, 391, 46 Sup. Ct. 126,
70 L.Ed. 322 (1926) 8
D & J Enterprises, Inc. v. Michaelson,
401 A.2d 440 [R.I.] (1979) 10

Daper v. United States, 358 U.S. 307 24
Erzonznik v. City of Jacksonville, 422 U.S. 205,
95 Sup. Ct. 2269 (1975) 7,8
First Amendment Foundation of Florida, Inc. v. Florida,
364 So. 2d 450 (1978) 9,10
Freedman v. Maryland, 380 U.S. 51 27
G.I. Distributors, Inc. v. Murphy, 490 F.2d 1167
(Calif. 1973) 22
Gibbs v. State, 504 S.W.2d 719 (1974) 9
Ginsberg v. New York, 390 U.S. 629 (1968) 15
Ginzburg v. United States, 383 U.S. 403 (1966) 15
Giordenello v. United States, 357 U.S. 480 24
Grayned v. City of Rockford, 408 U.S. 104
Sup. Ct. 2294 (1972) 7
Hess v. State, 536 P.2d 362, [Okla.] (1975) 9
Heller v. New York 413 U.S. 483 (1973) 28
Hamling v. United States, 418 U.S. 87 (1974) 16
Hunt v. State, 601 P.2d 464 (Okla.) (1979) 9
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676,
88 Sup. Ct. 1298 (1968) 8
Johnson v. State, 351 So. 2d 671 (Fla. App. 1975) 16,17
Joseph v. Burstyn v. Wilson, 343 U.S. 495,
72 Sup. Ct. 777 (1952) 4
Kinglsey Books, Inc. v. Brown, 334 U.S. 436 (1957) 15
Lee Art Theatre v. Virginia, 392 U.S. 636, 637 26,28
Leech v. American Booksellers Association, Inc.,
582 S.W. 2d 738 [Tenn.] (1972) 10
Lego v. Twomey, 404 U.S. 477 (1972) 24
Linkletter v. Walker, 381 U.S. 618,
85 Sup. Ct. 1731 (1965) 30
Locke v. United States, 7 Cranch 339, 348 24
McCright v. Olson, 367 F.S. 937
(Three-Judge D.N.D., 1973) 10
Manual Enterprises, Inc. v. Day, 370 U.S. 478 14

Mapp v. Ohio, 367 U.S. 643,
81 Sup. Ct. 1684 (1961) 30
Marcus v. Search Warrant, 367 U.S. 717 26
Miller v. California, 413 U.S. 15,
93 Sup. Ct. 2607 (1973) 1,4,5,6,7,9,10,11
Mishkin v. New York, 383 U.S. 502 (1964) 15
Mohoney v. State, 300 N.E.2d 66 (Ind. 1973) 10
Nathanson v. United States, 290 U.S. 41 24
Panzavecchia v. State, 201 So.2d 762 (1967) 27
People v. Andrews, 11 C.R. 276 (1972) 16
People v. Heller, 352 N.Y.S.2d 601,
33 N.W.2d 314 (1973) 9
People v. Hobbs, 375 N.E.2d 1367 [Illinois] (1978) 9
People v. New Horizons, Inc. 616 P.2d 106 [Col.] (1980) ... 10
People v. Neumayer, 275 N.W.2d 230
[Michigan] (1979) 9
People v. Ridens, 321 N.E.2d 264,
59 Ill. 2d 362 (1974) 9
People v. Speer, 52 Ill. A.3d 203,
367 N.E.2d 372 (1977) 17
People v. Tabron, 544 P.2d 372, [Col.] (1976) 8,10
People v. Vaughn, 183 Col. 40, 514 F.2d 1318 (1973) 4
People v. Williamson, 24 C.R. 734 (1962),
cert. denied, 377 U.S. 994 (1963) 16
Pierce v. State of Alabama, 473, 296 S.2d 218 (1974),
cert. denied, 419 U.S. 1130 (1975) 9
Price v. Commonwealth, 214 Va. 290, 201 S.E.2d 789 (1974),
cert. denied, 419 U.S. 902 (1975) 9
Rabeck v. New York, 391 U.S. 462,
88 Sup. Ct. 1917 (1968) 8
Rhodes v. State, 283 So2d 351 (Fla. 1973) 11
Roaden v. Kentucky, 413 U.S. 496 (1973) 28
Roth v. United States, 354 U.S. 476,
77 Sup. Ct. 134 (1957) 4,8,9
Schact v. United States, 398 U.S. 58,
90 Sup. Ct. 155 (1970) 4

Slaton v. Paris Adult Theater I, 231, G 312, 201 S.E.2d 456 (1973) *cert. denied*, 418 U.S. 939 (1974) 9
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 Sup. Ct. 1239, 43 L.Ed. 448 (1975) 12
Smith v. California, 361 U.S. 147 (1959) 12,13,14
Speiser v. Randall, 337 U.S. 512 (1958) 11
Stanford v. Texas, 379 U.S. 476 29
State v. Aiuppa 298 S.3d 391 6,7,10,11
State v. Amato 343 So.2d 698 [Louiaiana] (1977) 9
State v. American Theatre Corporation, 230 N.W.2d 209, 194 Neb. 84 (1974) 9
State v. Blair, 32 Ohio St. 2d 237, 291 N.E.2d 451 (1972) 17
State v. Bryant, 201 S.E.2d 211, 20 N.C. App. 223 (1973) 9
State v. Bryant, 203 S.E. 2d 27, 285 N.C. 27 (1974) 9
State v. Burch, 365 So.2d 1263 [Louisiana] (1979) 9
State v. Burgun, 384 N.E.2d 255, 56 Ohio St. 2d 354 (1978) 9
State of Louisiana v. Enforcement Specialists, Inc., 386 S.W. 653 15
State v. Haig, 578 P.2d 837, [Utah] (1978) 9
State v. Hughes, 508 S.W.2d 6 (Mo. 1974) 9
State v. Hull, 546 P.2d 912, 86 Wash. 2d 527 (1976) 9
State v. J-R Distributing Incorporated, 512 P.2d 1059 (1973) 9
State v. Manzo, 573 P.2d 945 [Hawaii] (1977) 9
State v. Piepenburg, 602 P.2d 702 [Utah] (1979) 9
State v. Princess Cinema of Milwaukee, Inc., 292 N.W.2d 807 (1980) 10
State v. Shreveport News Agency, 287 S.2d 464 (La. 1973) 10
State v. Siegel, 354 A.2d 103, 139 N.J. Super, 373 (1975) 9
State v. U & L Theaters, Inc., 307 So.2d Fla. App. (1974) 27

State v. Watkins, 203 S.E.2d 429 [S.C.] (1973) 9
State v. Wedelstedt, 213 N.W.2d 652 (La. 1973) 10
State v. Welke, 216 N.W.2d, 641 (1974) 9
Stone, 428 U.S. 465 90 Sup. Ct. 3037 (1976) 30
Terry v. Ohio, 382 U.S. 1, 88 Sup. Ct. 1868 (1968) 30
Thornhill v. Alabama, 310 U.S. 88,
60 Sup. Ct. 736 (1940) 7
U.S. v. Calandra, 414 U.S. 338,
94 Sup. Ct. 613 (1974) 30
U.S. v. DeFalco, et al., 509 F. Supp. 127
(D.C. S.D. Fla. 1981) 23
U.S. v. Lefkowitz, 285 U.S. 452 25
U.S. v. Sherwin, 572 F.2d 196 (DA-9) 22
U.S. v. Ventresca, 380 U.S. 102 at 111 24
Walter v. U.S., _____ U.S. _____ ,
100 S. Ct. 2395 19,21,22
Weeks v. U.S., 232 U.S. 383 (1914) 24
The Western Corporation v. Commonwealth,
558 S.W. 2d 605 [Kentucky] (1977) 9

Constitutional Provisions

First Amendment 4,7,8,12,13,19
Fourth Amendment 19,23,27,28,29,30
Fifth Amendment 19
Fourteenth Amendment 7,12,19

Statutory Provisions

Florida Statutes Annotated
§847.07 6,7,8,11,12,18,19
§847.07(1) 2
§847.07(4)(c) 2,4,12,20,23,29

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL LOCHIATTO, CHERYL ROGERS A/K/A CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME, ANTHONY BATTISTA,

Petitioners,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
FOURTH DISTRICT COURT OF APPEALS
FOR THE STATE OF FLORIDA

The Petitioners respectfully pray that a Writ of Certiorari issue to review the per curiam judgment of the Fourth District Court of Appeals, of the State of Florida, in which no opinion was published, of February 11, 1981. (Appendix A). A timely Petition for Rehearing was filed and denied without comment on March 12, 1981. (Appendix B).

Pursuant to Rule 9.030 of the Florida Rules of Appellate Procedure, the Supreme Court of the State of Florida lacks jurisdiction to consider questions of appeal where, as here, a Florida Court of Appeals has rendered a per curiam decision, without opinion. The

Fourth District Court of Appeals of Florida is therefore the highest state court of last resort in this case within the State appellate system.

OPINION BELOW

The Per Curiam Order of the Court and the minute entry denying the Petition for Rehearing are, as earlier indicated, attached hereto as Exhibits A and B.

JURISDICTION

The Per Curiam Order of the Fourth District Court of Appeals was entered on February 11, 1981 and the minute entry denying the Petition for Rehearing was rendered on March 12, 1981. Rule 9.030 of the Florida Rules of Appellate Procedure, under the circumstances of a per curiam decision without opinion, makes this the court of last resort in the State appellate system. An Application for Extension of Time Within Which to File a Petition for Writ of Certiorari was filed with this Court directed to the Honorable Lewis F. Powell, Jr. as Circuit Justice for matters arising out of the geographical area served by the Fifth Circuit, which encompasses the State of Florida. The Court by Order extended the time within which the Petition could be filed, to June 9, 1981. The Court's jurisdiction is invoked under Title 28 United States Code Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as well as Florida Statutes Annotated F.S.A. 847.07(1), 847.07(4)(c) are set forth in Appendix C. herein.

STATEMENT

Petitioners were convicted following a consolidated trial in the Circuit Court in and for Broward County, Florida. Petitioners were sentenced on September 14, 1978 on three Counts. Count 1:

Wholesale promotion of obscene material, F.S.A. 847.07(4)(c), a felony; Count 2: Conspiracy to engage in wholesale promotion of obscene material, F.S.A. 777.04(3), a misdemeanor; Count 3: Distribution of obscene material, F.S.A. 847.04(1)(2), a misdemeanor. Pre-trial motions to dismiss on the grounds of the unconstitutionality of the law were made and denied.

The Petitioners were sentenced as follows:

Michael Lochiotto, guilty on all three (3) counts. Five (5) years probation, concurrent, with the first six (6) months to be served by imprisonment in the County jail and a $1000.00 fine. Cheryl Rogers, a/k/a/ Cheryl Long, guilty on Counts 1 and 3. One probation concurrent, with a $250.00 fine. Paul Girdley, guilty on Counts 1 and 3. Three (3) years probation, concurrent, with the first thirty (30) days to be served by imprisonment, and a $500.00 fine. William Thayme, guilty on Count 2. One year probation, with the first ninety (90) days to be served by imprisonment, and a $250.00 fine. Anthony Battista, guilty on all three counts. Five (5) years probation, concurrent, the first year to be served by imprisonment, and a $5000.00 fine.

Petitioners are presently at large on bail pending this Petition for Writ of Certiorari.

The evidence of the materials alleged to be obscene was obtained by a search warrant, the procedures surrounding the issuance of the same are set forth in the issues raised by this Petition, as well as the warrantless seizure of three hundred (300) films from the warehouse without a search warrant a fact which was used before the jury to go to the issue of scienter. A Motion to Suppress was made pre-trial and denied.

After the sentencing, as aforesaid, relevant appeals were filed and have now been denied by the Court in a Per Curiam Order without opinion. It is from this Per Curiam Order affirming the judgments as against Petitioners, for which review is sought by this Petition.

REASONS FOR GRANTING WRIT

I.

THE FLORIDA OBSCENITY STATUTE, 845.07(4)(c) AS WRITTEN AND/OR AS THE SAME MAY HAVE BEEN AUTHORITATIVELY CONSTRUED, IS UNCONSTITUTIONAL FOR IMPERMISSIBLY CHILLING THE DISSEMINATION OF PRESS MATERIALS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THUS VOID OF VAGUENESS AND OVERBREADTH FOR FAILING TO CONFORM TO THE MINIMUM STANDARDS SET FORTH BY THIS COURT IN *MILLER V. CALIFORNIA*, (1973) 423 U.S. 15.

There is little doubt that the guarantees of the First Amendment extend beyond verbal expression. *Brown v. Louisiana*, 383 U.S. 131, 86 Sup. Ct. 719 (1966); *People v. Vaughn*, 183 Col. 40, 514 F.2d 1318 (1973). On numerous occasions, the United States Supreme Court has held that communicative entertainment is entitled to the protection of the First Amendment. *Joseph v. Burstyn v. Wilson*, 343 U.S. 495, 72 Sup. Ct. 777 (1952); *Schact v. United States*, 398 U.S. 58, 90 Sup. Ct. 155 (1970). Further, it is of no significance that the expression which is protected by the First Amendment takes place in a commercial setting. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 Sup. Ct. 631 (1963).

In *Miller v. California*, 413 U.S. 15, 93 Sup. Ct. 2607 (1973), the United States Supreme Court announced a new set of standards for identifying obscene material. This standard was necessary since the Supreme Court had abandoned the *Roth – Memoirs* test of obsentity as culled from the cases *Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 134 (1957) [hereinafter "Roth] and *John Cleland's*

"Memoirs of a Woman of Pleasure" v. Commonwealth of Massachusetts, 383 U.S. 413, 886 Sup. Ct. 975 (1966) [hereinafter "Memoirs"]. ". . . Now the Memoirs Test has been abandoned as unworkable by its author, and no Member of the Court today supports the Memoirs formulation." *Miller v. California, supra.* It should be noted that F.S. 847.07 was designed specifically to meet the standards of the *Roth – Memoirs* test, as expressly invalidated by the Court in *Miller.*

The *Miller* standards were announced as,

> "(a) Whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the purient interest . . .;
>
> (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) Whether the work, taken as a whole, lacks serious litery, artistic, political, or scientific value." *Miller*, at 24, 25.

In an attempt to further define the Section (b) requirement of the above standard, the Court adopted a 'hard core' test. The Court then outlined two examples of what was meant by that term 'hard core';

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra.*

The *Miller* Court further required that in order for a state statute to meet this test, its scope of regulation must be confined to "works which depict or describe sexual conduct" and:

> "[t]hat conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller, supra.*

Florida Statute §847.07 does not meet the *Miller* standard for specificity of conduct to be regulated as written or as authoritatively construed.

The Florida Supreme Court's unclear and unreasonable attempt to "authoritatively construe" §847.07 in *State v. Aiuppa,* 298 S.3d 391, amounts to an impermissible usurpation of the legislatie function of the Florida legislature. The construction placed upon this statute is tantamount to a complete judicial rewriting solely for purposes of meeting changing United States Supreme Court standards and guidelines.

The Court clearly amended §847.07 F.S. (then Ch. 120 Laws of Florida) calling it 'authoritative construction'. A simple comparison of the pertinent portion of the statue, before and after *Aiuppa,* reveals the enormity of the Court's revision. The statute, by its language, defines materials obscene if:

> "The statutory definition states: 'Material is obscene if . . . its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion . . ." *Aiuppa,* at 396.

After the Supreme Court of Florida construed this same passage, it is purported to mean:

> "Materials are obscene if its predominant appeal is to prurient interest, that is, sexual conduct which is shameful or morbid such as nudity, sex, which includes sexual interecourse, cunnilingus, sodomy, and fellatio, or excretion."

It is unclear whether the "interest" modified by prurient should itself be changed to "conduct" or not as the Court seemingly addresses only the clarifying language of the statute. It is clear from this reading of the statute that the Florida Supreme Court is merely

attempting to place the specific language required of the *Miller* test, into a statute that was designed to comply with *Roth – Memoirs* test. Such a clearly demonstrable case of judicial usurpation of legislative functions is abhorrent and unconstitutional under Florida law. *Florida Constitution, Article 2, Section 3, F.S.A.*

Even assuming, *arguendo,* that the Supreme Court of Florida had the power to legislate in the manner described above, and exercised it properly, §847.07 is still unconstitutional under the laws of the United States. The Florida Supreme Court has failed to delineate in *Aiuppa,* or any case since, the full range of activities that are included in their construction of obscene. While holding in *Aiuppa* that, " . . . these . . . *include* cunnilingus, sodomy and fellatio . . . " (Emphasis added). *Aiuppa,* at 396. The Court does not give nor suggest that a specific description of "an ultimate sexual act" other than those listed exist. If, in fact, these three acts are "included" in an entire grouping of prohibited acts, the specificity required by the *Miller* decision is still lacking. Floridians must now guess as to what other "conduct" renders nudity and sex shameful and morbid in the minds of the justices of the Florida Supreme Court. No Florida citizen can be given notice as to any further prohibited acts by this construction, yet many may refrain from engaging in the distribution of protected First Amendment materials due to the vagueness of this authoritative construction of the statute.

A statute which sweeps within its ambit of activities which in ordinary circumstances constitute freedom of speech or expression, is overbroad in violation of the First and Fourteenth Amendments. *Thornhill v. Alabama,* 310 U.S. 88, 60 Sup. Ct. 736 (1940); *Grayned v. City of Rockford,* 408 U.S. 104 Sup. Ct. 2294 (1974). The concern of the courts in fashioning and applying the doctrine of overbreadth is to insure that broadly worded statutes do not deter through fear the exercise of First Amendment rights. *Coates v. Cincinnati,* 402 U.S. 611, 91 Sup. Ct. 1686 (1971).

The Supreme Court of the United States in *Erzonznik v. City of Jacksonville,* 422 U.S. 205, 95 Sup. Ct. 2268 (1975), recognized the

need for specificity and clarity especially when the statute seeks to regulate or prohibit rights protected by the First Amendment.

The standard in F.S. §847.07 is by its very nature, vague and "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 Sup. Ct. 126, 70 L.Ed. 322 (1926). Its language, even as construed, is hardly more definite than other terms which have been struck down in such cases as *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 Sup. Ct. 1298 (1968), and *Rabeck v. New York*, 391 U.S. 462, 88, Sup. Ct. 1917 (1968).

The overbreadth tendency of obscenity statutes has been recognized by the Colorado Supreme Court. When confronting its own state obscenity statute, the Court said:

> "Given their plain and ordinary meaning, the words 'nudity, sex, sexual conduct, sexual excitement, . . . sadism, masochism, or sado-masochistic abuse,' are not representative of the specificity contemplated by the Supreme Court in *Miller*. The Supreme Court has declared that to be obscene, 'expression must be in some significant way, erotic.' *Erznoznik v. City of Jacksonville*, supra; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 Sup. Ct. 2628, 37 L.Ed. 2d 446 (1973); (Brennan J. dissenting); *Cohen v. California*, 403 U.S. 16, 9 Sup. Ct. 1780, 29 L. Ed. 2d 284 (1971); *Roth v. United States*, 354 U.S. 476, 77 Sup. . . . 1304 L.Ed 2d 1498 (1957). The statutory definition of 'obscene' in Colorado is drawn overly broad in that it obviously includes activities which could be described or depicted in some context other than an erotic one." *People v. Tabron*, 544 P.2d 372 (1976). (Emphasis added).

The Florida statute is plainly lacking the requirement of eroticism and suffers the same defect as Colorado's statute prior to its invalidation.

The Washington Supreme Court in *State v. J-R Distributing Incorporated*, 512 P.2d 1049 (1973), reasoned that the engrafting was acceptable since, as they contended, the *Roth* definition of obscenity was still valid. However, the Court was unable to cite any post-*Miller* decisions in support of this proposition. *J-R Distributing*, supra., at 1060.

Other State Supreme Courts have considered their state's obscenity statutes and found them to be within the constitutional requirements of *Miller* due to *authoritative constructions*. *Slaton v. Paris Adult Theater I*, 231, G 312 201 SE2d 456 (1973), *cert denied*, 418 U.S. 939 (1974); *Pierce v. State of Alabama*, 473, 296 S.2d 218 (1974), *cert. denied*, 419 U.S. 1130 (1975). *People v. Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1973); *Price v. Commonwealth*, 214 Va. 290, 201 S.E.2d 789 (1974), *cert. denied*, 419 U.S. 902 (1975); *Gibbs v. State*, 504 S.W.2d 719 (1974); *State v. Welke*, 216 N.W.2d, 641 (1974); *State v. Amato*, 343 So.2d 698 [Louisiana] (1977); *The Western Corporation v. Commonwealth*, 558 S.W.2d 605 [Kentucky] (1977); *Hunt v. State*, 601 P.2d 464 [Okla.] (1979); *State v. Piepenburg*, 602 P 2d 702 [Utah] (1979); *State v. Haig*, 578 P.2d 837, [Utah] (1978); *State v. Manzo*, 573 P.2d 945, [Hawaii] (1977); *State v. Hull*, 546 P.2d 912, 86 Wash.2d 527 (1976); *Hess v. State*, 536 P.2d 362, [Okla.] (1975); *State v. American Theater Corporation*, 230 N.W.2d 209, 194 Neb. 84 (1974); *State v. Siegel*, 354 A.2d 103, 130 N.J. Super, 373 (1975); *People v. Neumayer*, 275 N.W.2d 230 [Michigan] (1979); *State v. Bryant*, 203 S.E.2d 27, 285 N.C. 27 (1974); *State v. Watkins*, 203 S.E.2d 429 [S.C.] (1973); *Alexander v. Commonwealth*, 203 S.W.2d 441, 214 Va. 539 (1974); *State v. Bryant*, 201 S.E.2d 211, 20 N.C. App. 223 (1973); *State v. Burgun*, 384 N.E.2d 255, 56 Ohio St.2d 354 (1978); *People v. Hobbs*, 375 N.E.2d 1367 [Illinois] (1978); *People v. Ridens*, 321 N.E.2d 264, 59 Ill. 2d 362 (1974); *Commonwealth v. Claflin*, 298 N.E.2d 888 [Mass.] (1973); *People v. Heller*, 352 N.Y.S.2d 601, 33 N.W.2d 314 (1973); *State v. Burch*, 365 So.2d 1263 [Louisiana] (1979); *First Amendment Foundation of Florida, Inc. v. Florida*, 364 So.2d 450 (1978).

Many other State Supreme Courts, realizing they had no prior authoritative construction, or refused to do so, as admitted by the Court in *Aiuppa*, and recognizing the doctrine of legislative supremacy, have invalidated their state obscenity statutes. *People v. Tabron*, supra.; *Mohoney v. State*, 300 N.E.2d 66 (Ind. 1973); *State v. Wedelstedt*, 213 N.W.2d 652 (Ia. 1973); *State v. Shreveport News Agency*, 287 S.2d 464 (La. 1973); *Commonwealth v. Horton*, 310 N.E.2d 316 (Mass. 1974); *Art Theater Guild, Inc. v. State*, 510 S.W.2d 258 (Tenn. 1974); *Commonwealth v. MacDonald*, 34 Atl.2d 290 (Pa. 1975); *ABC Interstate Theaters, Inc. v. State*, 325 S.2d 123 (Miss. 1976); *McCright v. Olson*, 367 F.S.937 (Three-Judge D.N.D., 1973); *State v. Princess Cinema of Milwaukee, Inc.*, 292 N.W.2d 807 (1980); *D & J Enterprises, Inc. v. Michaelson*, 401 A.2d 440 [R.I.] (1979); *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738 [Tenn.] (1979); *Art Theater Guild, Inc. v. State*, 510 S.W.2d 258 [Tenn.] (1974); *People v. New Horizons, Inc.*, 616 P.2d 106 [Col.] (1980); *People v. Tabron*, 544 P.2d 372, [Col.] (1976).

The Florida Supreme Court tried in 1979 to engraft an authoritative judicial construction on §847.07 of F.S.A. in the case of *First American Association of Fla., Inc. v. State*, 364 So.2d 450 (Fla. 1979), when they stated in pertinent part:

> "In *State v. Aiuppa*, 298 So.2d 391 (Fla. 1974), we considered the constitutionality of Section 847.07 under the standards of *Miller*. That is, we were faced with the question whether the statute specifically defines conduct the depiction or description of which shall be deemed to be obscene. We construed the statutory language defining obscenity in terms of appeal to prurient interest to refer to the depiction of certain conduct. And we held that the specific acts of sexual conduct the depiction of which was proscribed by the statute included intercourse, cunnilingus, sodomy and fellatio.

The *Aiuppa* decision stands for the further proposition that authoritative constructions that amplify an anti-obscenity statute that are in force (published) at the time of an obscenity offense apply to define obscenity for purposes of notice of what is proscribed and for purposes of instructing a jury so that the judicial constructions may be considered in determining whether the statute meets Miller standards. This principle is also stated in *Rhodes v. State*, 283 So.2d 351 (Fla. 1973).

The *Aiuppa* rule of applicability of authoritative constructions in force at the time of the offense is applicable here. *Aiuppa* itself provides such an amplifying construction and was in force at the time of the commission of the obscenity offenses at issue now. The appellant clearly was put on notice that the films it exhibited depicted conduct reached by the statute. The types of ultimate sexual acts 'specifically defined by the applicable state law, as written by authoritatively construed,' *Miller*, above, include precisely those alleged in the informations to have been depicted in these films. The trial court judge was correct in upholding the statute against appellant's vagueness challenge."

Thus, as has been shown, §847.07 has not been constitutionally rewritten by the Supreme Court of the State of Florida. Further, even if the state as rewritten is considered a valid construction, it still is not specific enough to meet constitutional scrutiny within permissible limits imposed by the case of *Miller v. Calif., supra.*

"Invariably the Court has felt obliged to condemn systems in which the exercise of such authority was not bound by precise and clear standards. The reason has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste of censorship — reflecting the natural distaste of a

free people is deepwritten in our law." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 95 Sup. Ct. 1239, 43 L. Ed.2d 4448 (1975).

For these reasons, F.S. §847.07 is unconstitutional and unavailable to prosecute Petitioners in the present case.

II

A STATE STATUTE WHICH HAS BEEN CONSTRUED TO DEFINE "SCIENTER" OR "KNOWING" THE "CONTENTS AND NATURE AND CHARACTER" OF THE PRESS MATERIALS CHARGED AS VIOLATIVE OF THE FLORIDA OBSCENITY STATUTE, F.S.A. 847.07(4)(c) IN A MANNER AUTHORIZING OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE, VIOLATES PETITIONERS' DUE PROCESS RIGHTS AND IMPERMISSIBLY CHILLS THE DISSEMINATION OF PRESS MATERIALS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

In *Smith v. California,* 361 U.S. 147 (1959), the Supreme Court reversed the convicition of a proprietor of a bookstore who was convicted pursuant to a City Ordinance which had been construed to impose abosolute criminal liability for mere possession of obscene materials. Justice Brennan, speaking for the majority, said the ordinance was constitutionally defective under the First Amendment because it failed to require that the possessor or seller have *scienter,* which he equated with "knowledge of the contents" of the material in question. In the absence of a *scienter* requirement, he noted that any statute or ordinance that permitted the imposition of criminal liability for the sale or possession of obscene materials would be

likely to result in an impermissible self-censorship by the bookseller, thereby restricting the public's access to non-obscene as well as obscene material. As the majority of the Court stated:

> "For if the bookseller is criminally liable without knowledge of the contents and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself and his timidity in the fact of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, wold be impeded." 361 U.S. at 153-154.

Broadly, the case stands for the proposition that there can be no constitutionally valid imposition or imputation of criminal liability where the statute or ordinance that an individual may be charged with violating could implicate in any of its possible applications a potential infringement of the rights guaranteed in the First Amendment.

In *Speiser v. Randall*, 337 U.S. 512 (1958), the Court stated that in a criminal prosecution, due process demands that where a person is to suffer a penalty for a crime, the prosecution must prove the elements of the crime beyond a reasonanble doubt. The Court went on to say that "where the First Amendment is involved a State cannot declare an individual presumptively guilty of a crime or presume that he has committed one of the material elements thereof." *Supra*. at 523-524.

Thus, it can be said that the government cannot create a presumption of *scienter* from a mere finding that the material in question is obscene, in the absence of any affirmative evidence on the issue of *scienter*.

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), three publishing corporations having a common president brought suit in the United States District Court for the District of Columbia to enjoin a non-mailability order of the Postmaster General against certain of their magazines. The District Court denied injunctive relief, and the Supreme Court reversed. Justice Harlan, in announcing the judgment of the Court, was of the view that without a showing of *scienter* on the part of the publishers, the magazines could not be removed from the mails on the ground that they contained information of where obscenity could be obtained.

Justices Harlan and Stewart denied proscription of the magazines because it was nnot shown that the publishers knew their advertisers were offering explicit matter. Thus, the Court held that actual knowledge of the nature of the publications is required under *Title 18 U.S.C. §1461*. The two Justices applied the reasoning of *Smith v. California, supra.*, to the case. They felt that the fear of loss of an issue of a periodical by removing it without a showing of knowledge or *scienter* on the part of the publishers would give rise to self-censorship.

Thus, it is clear requisite *scienter* cannot be predicted on a presumption i.e., that a distributor's knowledge that the general character of his stock is sexually oriented is not presumptively determinative that he had the requisite knowledge of the character and content of a magazine. This same analogy is applicable to a proprietor of a bookstore, i.e., the proprietor is presumed to be aware of the general nature of the stock he carries, but without facts proving the proprietor was aware of the specific character of a magazine lying on his shelf, he cannot be held to have the requisite *scienter* needed for a violation of statute. From the viewpoint of pure First Amendment theory and Court decisions involving statutory regulation of obscenity, the central problem involved in the *scienter* requirement lies in the determination of the type of evidence which supports a constitutional finding of *scienter*.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Appellant was convicted pursuant to a New York statute for hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell the same. The evidence of *scienter* was founded in part upon the Appellant's "instructions to his artists and writers, his efforts to disguise his role in the enterprise that published and issued the books, the transparency of the character of the material in question, the massive number of obscene books he published, hired others to prepare, and possessed for sale." The Court held that "proof of guilty knowledge was required in order to avoid the hazard of self-censorship and to compensate for the ambiguities inherent in the defintiion of obscenity." *Supra.* at 511. Thus, the evidence disclosed that the Appellant was "aware of the character of the material" inasmuch as he took a predominant role in the production of the material as publisher, author, and editor. Thus, the Court found ample evidence of a "calculated purveyance of filth" to establish *scienter*. It is important to note that the requisite *scienter* was predicated upon the facts which amply showed that the Appellant personally and purposefully directed the creation of material which was designed to appeal to deviant sexual groups. No such showing has been made in this case. As to Petitioners BATTISTA and GIRDLEY, no scintilla of evidence of *scienter* was ever entered at trial.

Relying on the Supreme Court decisions which have attempted to illustrate the constitutional requirement of *scienter*, it is apparent that in each case the evidence adduced showed that the Petitioners, and each of them, knew or had reason to know of the explicit nature of the material. This situation must be distinguished from that of a publisher or retailer who has been charged with violating the applicable obscenity statutes, where there is lack of affirmative evidence showing that he was personally aware of the explicit nature of a book, magazine or film, as in the instant case. See *Kingsley Books, Inc. v. Brown*, 334 U.S. 436 (1957); *Ginzburg v. United States*, 383 U.S. 463 (1966); and, *Ginsberg v. New York*, 390 U.S. 629 (1968); *Commonwealth v. Rosenberg*, 398 N.E.2d 451; *State of Louisiana v. Entertainment Specialists, Inc.*, 386 So.2d 653.

The most recent pronouncement of the United States Supreme Court on the requirments of *scienter* is found in *Hamling v. United States*, 418 U.S. 87 (1974). There, the Supreme Court confirmed the constitutional relevance of *scienter* as a necessary ingredient to a conviction under obscenity laws. Justice Renquist, writing for the majority, stated:

> "We think the 'knowingly' language of 18 *U.S.C.* §*1461* and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the Appellant *had* knowledge of the contents of the material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (Emphasis added).

Consistent with the above statements from *Hamling*, the prosecution must show that Petitioners and each of them, "had" knowledge of the content, character and nature of the materials, rather than that he "should have had" knowledge of the content, character, and nature of the materials with which he was charged.

In order to determine whether a Petitioner had the requisite *scienter*, State and Federal Courts have looked to several factors. For example, in *People v. Williamson*, 24 C.R. 734 (1962), *cert. denied*, 377 U.S. 994 (1963), the Appellant was convicted pursuant to a California statute prohibiting the "wilful sale of an obscene book." The finding of *scienter* was established by the evidence which disclosed the following facts: (a) that the Appellant was informed that the book was "filthy;" (b)that the Appellant read the book and stated that "it was pretty bad;" and, (c) that the Appellant ordered additional copies of the book and that Appellant continued to sell them at the time he admitted that he read the book. Thus, the *scienter* requirement was based on the fact tht since the Appellant had admittedly read the book, he was charged with knowledge of the sexually explicit character of the book. The Florida Supreme Court seemed to say the same thing in *Johnson v. State*, 351 So.2d 10 (1977).

Mere ownership of an establishment has been held insufficient to prove *scienter* in *People v. Andrews*, 11 C.R. 276 (1972).

The *scienter* requires knowledge of the contents and the nature and character of a publication, has also been shown in *Commonwealth v. Thureson*, 357 N.E.2d 750 (Mass. 1976). In *Commonwealth v. Rosenberg, supra*, the Petitioner, had worked in the bookstore for three days. She claimed that she did not know for whom she worked, and upon being questioned, responded to the police officer, that although she had a "pretty good idea" what was in the peep-show machines, she had never viewed the films. From these facts, the Supreme Judicial Court of Massachusetts reasoned that the prosecution failed to produce evidence "from which a jury could conclude beyond a reasonable doubt that the Appellant had seen, or should have seen or otherwise had knowledge of, the material's contents," especially in light of the fact that no one had called Appellant's attention to the contents of the machines at the back of the store and her sole contact with them was to change money. See also *People v. Speer*, 52 111, A.3d 203, 367 N.E.2d 372 (1977); *State v. Blair*, 32 Ohio St.2d 237, 291 N.E.2d 451 (1972); and, *Johnson v. State*, 351 So.2d 671 (Fla. App. 1975).

In *Campagno v. State*, 323 So.2d 671 (Fla. App. 1978), the Appellant was convicted pursuant to a Florida statute for conspiracy to promote any obscene matter or performance. The evidence disclosed that the Appellant had procured and paid performers who acted out scenes depicting sexual intercourse, cunnilingus, fellatio; he also had given advice to performers, and had taken still photographs. On appeal, the District Court of Appeals of Florida held that this evidence coupled with evidence that Appellant received compensation for his services performed in connection with the filming established *scienter* and was sufficient to sustain Appellant's conviction.

At this point, it is significant to note that to render one guilty of knowingly selling or distributing obscene materials, it is necessary

that Petitioners, and each of them, had actual knowledge of the contents of the material, as well as character and natures of the films. It is important to note that *scienter* has been based on various factors: (1) A Dealer's *personal* involvement in the creation, assembly, and advertisement of the material; (2) A Dealer's *personal* selection of materials which depicted the sexual activity; (3) A Dealer's *personal* dominion and control over shipmentsof films, and his furtive attempts to dissuade law officers; (4) A Dealer's *purposeful* design to distribute press materials that would appeal to a prurient interest; (5) A Dealer's commercial exploitation of erotica through advertisements of textual and graphic emphasis of the sexually provocative aspects of his films; and (6) A Dealer's widespread and indiscriminate distribution by a manner which thrusts on the unwilling public of materials with reckless disregard of the identity and age of his recipients.

It is apparant from the jurisprudence that actual knowledge of the contents and nature and character of the books, or where the circumstances so warrant *scienter*, is to be based on facts which establish that the Petitioners had reason to be aware of the contents and nature and character of the material. Each case established the fact that it was the Petitioner's *personal* involvement either in the creation, advertisement or dissemination of material which established a factual predicate for holding that the Petitioners had "knowledge" within the meaning of the obscenity statutes.

The constitutional mandates require that a conviction under F.S.A. §847.07 must be based on facts which prove that Petitioners, and/or each of them, was shown to have cognizable knowledge of the contents and of the nature and character of the materials he was charged with wholesaling or distributing.

Relying on the constitutional and criminal mandates, it can be observed that when any act is made criminal by statute, the existence of a criminal intent must be regarded as an essential element of the crime charged.

Thus, the quality of *scienter* needed to sustain a conviction under §847.07 must be based on affirmative evidence, establishing a factual predicate for a constitutional finding that the party charged did in fact have knowledge of the contents and nature and character of the materials he is charged with transporting or distributing. It is submitted that the failure of the State to prove this essential element of its case against the Petitioners entitle them to a new trial as a matter of law. This is especially true as to Petitioners BATTISTA and GIRDLEY against whom no evidence of *scienter* was produced at trial.

Accordingly, the *scienter* requirements as set forth in the First Amendment Rulings of this Court have been improporly applied as to Petitioners, and each of them, and as such this Petition should be granted.

III

THE PROCEDURES EMPLOYED BY LAW ENFORCEMENT OFFICIALS WERE VIOLATIVE OF PETITIONERS' FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS WHERE AS HERE, THE ISSUANCE OF THE SEARCH WARRANT BY THE MAGISTRATE DID NOT FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY, AND WHERE AS HERE, A MASS WARRANTLESS SEIZURE OF APPROXIMATELY THREE HUNDRED (300) ADDITIONALLY SEXUALLY FILMS WAS MADE, IN VIOLATION OF THE TEACHINGS OF *WALTER v. U.S.*, _____ U.S. _____ 100 S. Ct. 2395 (1980), AND WHERE AS HERE, THE "FRUIT" OF THE "POISON" TREE WAS INTRODUCED IN EVIDENCE ON THE ISSUE OF SCIENTER.

The facts involved in the obtaining of the search warrant used to obtain two (2) allegedly obscene films from the warehouse located at 1415 Southwest 21st Street, Fort Lauderdale, Florida were highly unusual and violative of the Petitioners' rights under the First, Fourth and Fourteenth Amendments to the Constitition of the United States. This magistrate authorized search initiated by local law enforcement officials was merely the seminal act that led to the confiscation of three hundred (300) sexually oriented motion picture films by the officers, and this was done without benefit of judicial scrutiny being involved in the seizure process, and was a total prior restraint because all films kept on the premises for rental to local movie house exhibitors were summarily confiscated.

The facts alleged to be highly unusual and violative of Petitioners' rights in summary were as follows:

On July 25, 1977, an investigator for the office of the State's Attorney for Broward County, Florida, appeared befor a Judge Reasbeck, who was a judge within the circuit and obtained a search warrant to seize two (2) films entitled "Emergency Nurse" and "Venture in Bizzare" and in his general language affidavit he alleged that the laws of the State of Florida were being violated. F.S.A. 847.07(4)(c). He states that the following things can be found on the premises "colored motion picture films entitled "Emergency Nurse" and "Venture in Bizzare"and goes on to state that all books and records which are evidence of violation of Florida Statute 847.07(4)(c).

The following observations were contained in the probable cause affidavit. One was that Detective Rigio of the Pompano Beach Department observed an individual leaving the premises at Southwest 21st Avenue in Fort Lauderdale where he drove to a cinema in Pompano Beach, where he moved several cardboard cartons of the size and nature containing motion pictures. He entered the Fashion Cinema. Sergeant Greico observed the individual in conversation with the operator and projectionist at Fashion Cinema. Thereafter, another detective, Marty Schutt observed this individual removing

several other cartons from Fashion Cinema, placing them in the trunk of his vehicle. Then Detective Schutt observed the individual take several cartons from Fashion Cinema and return to the premises where the search later was conducted and removed approximately ten cartons and carried them inside.

On July 7 Detective Rigio looked at the films at the Fashion Cinema and prepared a detailed affidavit describing explicitly the contents. Apparently he then went to a Judge Moore and had a search warrant executed to search the premises occupied by Fashion Cinema in Pompano Beach. The affidavit of Detective Rigo was not shown to Judge Reasbeck at the time Mr. Holloway the investigator from the State's Attorney's Office sought the search warrant for the location at 1415 Southwest 21st Avenue, Fort Lauderdale, Fla. Counsel for the State so stipulated at the time of the hearing on the Motion to Suppress.

In his affidavit, Investigator Holloway, somewhat overstated matters to Judge Reasbeck, when he alleged that Judge Moore had made a finding that the two (2) movies in question were obscene. He did not state that only "probable cause" had been found by Judge Moore as to the premises at Fashion Cinema in Pompano Beach.

Additionally, approximately three hundred (300) hour long films were concededly seized without any warrant. Although these films were not shown to the jury, surely as the "fruits of the poison tree" they should not have even been mentioned in the evidence to the jury. Notwithstanding the objections by Petitioners, the characterization of the films as "sexually oriented" was permitted to go to the jury on the issue of *scienter*.

It is against this factual background that we argue that fundamental rights of Petitioners were violated both by the search authorized by a warrant and the warrantless search.

This warrantless seizure by police officials while executing a search warrant already contended herein by Petitioners to be procedurely suspect, went too far and violated Fourth Amendment proscriptions most recently re-reiterated by this Court in *Walter v. United*

States _____ U.S. _____, 100 S. Ct. 2395, where Mr. Justice Stevens writing on this matter states:

> "When an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization . . . That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained."

Certainly as to the warrantless seizure of the three hundred (300) films, and the use of this "fruit" of the "poison" tree at the trial to estalbish attempt to establish scienter on the part of the Petitioners, the State has gone too far and this issue is clearly worthy of certiorari consideration.

The law enforcement officials could have clearly had a remedy available to them as suggested in the case of *U.S. v. Sherwin*, 572 F2d. 196 (CA-9) at page 200 where we read: "A preferable and less intrusive method would be for the officers to seal the area to prevent destruction of any publications while they obtained another warrant." See also *G.I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (CA2 1973). This certainly is now the teaching of this court following the *Walter* case decided on June 20, 1980.

The factual circumstances invlved in obtaining the search warrant from Judge Reasbeck, are so highly unusual that ample precedent to support the same cannot be found in the jurisprudence. To omit showing the judge authorizing the seizure complained of herein, a detailed description of the two (2) films sought to be seized, and to mislead the Judge to believe that another Judge of the same circuit had made a judicial determination of obscenity when in fact it was but merely a finding of probable cause, should be sufficient in the case at bar to invalidate the whole search and seizure.

These issues were presented pre-trial to the Court and she denied the Motions to Suppress directed to the two (2) issues raised herein.

Although not clearly on point, a recent decision by Judge Spellman in an obscenity prosecution in the Southern District of Florida, raised a factual issue not unlike the case at bar. In the case of *United States v. Defalco, et. al.* 509 F. Supp. 127 (D.C. S.D. Fla. 1981) the Court on ruling on pre-trial Motions to Suppress, dealt with a question wherein the affidavit used to obtain the search warrants at several places throughout the United States, contained the conclusory assertions that a grand jury had viewed the suspect materials in question and had determined them to be obscene. No qualifying language about "probable cause" was used therein. There the government concedes that under the facts before Judge Spellman "there was no searching focus on or careful scrutiny of the allegedly obscene mateiral by the magistrate." Against that background, the Court ruled to suppress the materials seized under the search warrants.

Perhaps a more generalized discussion of the law of search and seizure as it relates to cases arising within the penumbra of the First Amendment is in order.

The threshold question is "does the general affidavit and application for search warrant, together with the probable cause affidavit, executed by Affiant, ROBERT HOLLOWAY, an investigator for the State's Attorney's Office for the Seventeenth Judicial Circuit in Broward Count, Florida, togehter with the exhibits attached thereto establish sufficient basis from which the Court could find probable cause to believe that crime was being perpetrated on the premises," to wit: wholesale promotion of obscene matter, Florida Statutes §847.07(4)(c).

It is the assertion of Petitioners that probable cause was not estalbished by the supporting affidavits and the exhibits attached thereto.

The Fourth Amendment of the Constitution of the United States sets for the following:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched and the person or thing to be seized."

In moving to suppress evidence which it is contended has been seized in violation of this constitutional provisions, the Court need apply to the government a burden of only a preponderance of the evidence. The Constitution does not require the government to assume the burden of "reasonable doubt." In *Lego v. Twomey*, 404 U.S. 477 (1972) at pages 488-489, Mr. Justice White writing for the plurality states: " . . . from our experience over this period of time (since *Weeks v. United States*, 232 U.S. 383 (1914)) no substantial evidence has accumulated that Federal rights have suffered from determining admissibility by a preponderance of the evidence."

Further, Justice White rules:

" . . . when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.

In considering whether "probable cause" existed at time of the application for the search warrant, the Supreme Court has these enlightened words of advice for Courts that are considering questions arising under the Fourth Amendment.

"While a warrant may issue only upon a finding of 'probable cause', this Court has long held that the 'term (probable cause) . . . means less than evidence which wold justify condemnation.' *Locke v. United States*, 7 Cranch 339, 348 and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. *Daper v. United States*, 358 U.S. 307." *United States v. Ventresca*, 380 U.S. 102 at 111. See also *Brinegar v. United States, 338 U.S. 160;* Nathanson v. United States, 290 U.S. 41; and, *Draper v. United States*, 358 U.S. 307.

In *Giordenello v. United States*, 357 U.S. 480, the Court was

presented with the question as to whether the complaint on which the warrant was issued was inadequate because the complaining officer, relied exclusively upon hearsay information rather than personal knowledge in executing the complaint. The Court, by Mr. Justice Harlan held that indeed the basis on which the warrant was issued was inadequate and rules:

> "The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed."

In 1964, the high Court attempted to clarify what was required when dealing with an affidavit presenting the litany of what is a "rasonable informant" by its ruling in *Aquilar v. Texas,* 378 U.S. 108, wherein Mr. Justice Goldbers wrote as follows:

> "An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz,* 285 U.S. 452 . . . The affidavit here not only 'contains no affirmative allegation that affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possesison. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied upon . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion', 'belief', or 'mere' conclusion.'

"We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for finding of probable cause and that the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial.'

In *Marcus v. Search Warrant*, 367 U.S. 717 it was stated:

"The use by government of the power of search and seizure as an adjunct to a system for the supression of objectionable publications is not new. Historically, the struggle for freedom of press in England was bound up with the issue of the scope of the search and seizure power . . . the question here is whether the use by Missouri in this case of search and seizure power to suppress obscenity . . . involved abuses inimical to protected expression . . . for the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their exeuciton were adequate to avoid suppression of constitutionally protected material . . . we believe that Missouri's procedures as applied in this case lacked the safeguards which due process determines to assure non-obscene material the constitutional protection to which it is entitled . . . they (police officers) were provided with no guide to the exercise of informed discretion because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."

Likewise, this Court went even further in *Lee Art Theatre v. Virginia*, 392 U.S. 636, p. 637, when the per curiam opinion stated:

"A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered . . . obscene' was held to be an unconstitutional seizure in *Marcus v. Search Warrant* . . . The procedure under which the warrant

> issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officers' conclusions were not a procedure 'designed to focus searchingly on the question of obscenity . . .' . . . and therefore fell short of constitutional requirements demand necessary sensitivity to freedom of expression. See *Freedman v. Maryland,* 380 U.S. 51.

It is well established that Fourth Amendment guarantees the right to people to be sucure in their persons, houses, and effects, and also apply to businesses. Thus, the holding in *Panzavecchia v. State,* 201 So.2d 762 (1967), regarding the sufficiency of an affidavit for a dwelling house would also seem to apply to the business of Appellants. In that case, it was held that the admission of evidence obtained as a result of a search warrant for a dwelling house was in error where the affidavit on which the warrant was issued did not on its face show probable cause. The Court rejected the State's contention in this case that the State should be permitted to support the affidavit with additional evidence outside of the affidavit and exhibits. The Court discussed the Florida Statutes relating to search warrants (933.06 and 933.18), and stated that where the legislative enacts two laws, one specific, and one general, the specific will control over the general. This would support the idea that the general construction of the warrant as to our Appellants' "books and records" would fail to be specific enough.

In an obscenity case, *State v. U & L Theaters, Inc.,* 307 So2d Fla. App. (1974), the lower Court quashed the search warrant and directed the return of the film. The State took an interlocutory appeal and the Florida District Court of Appeals, Third District, upheld the lower Court; affirmed. The Affiant in this case had viewed the two films that had been seized, he described the contents of these films in detail, whereupon the judge issued a search warrant stating that he found probable cause. The only copies of the films were seized and the obscenity *vel non* of the materials seized was not determined prior to seizure. The question was whether the seizure of the films, being

the only copies, was unreasonable under the *Fourth Amendment* standards. Citing *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), the Court held that seizing the only copies represents the same restraint on expression as the seizure of all the books in a bookstore. Thus, prior to the issuance of the warrant for the seizure of the Appellant's only copies of the materials, it was necessary that a neutral and detached magistrate have a full opportunity for an independent judicail determination of probable cause and further was thus able to "focus searchingly on the question of obscenity." The Third District Court stated that with respect to the case at bar, the trial judge issued the search warrant which resulted in seizure based upon his perfunctory examination of an affidavit, submitted by the law enforcement officer, with no offer by the State to permit copying thereof pending a determination of their obscenity *vel non*. The Court thus found that the procedure designed to focus searchingly on the issue of the obscenity *vel non* of the materials. The Court found the warrant insufficient and the seizure unreasonable under the Fourth Amendment standards as a form of constitutionally prohibited prior restraint.

The preceding cases support the proposition that the affidavit was insufficient in that it only states the names of two movies without any detailed description of the contents thereof, stating merely that Detective Rigia "prepared a detailed affidavit describing explicitly the contents of said (two) films."

That affidavit was not attached to the search warrant application in the case at bar, and thus we are left with the thought that absent the detailed description of each film by affiant, that there was no informed, focused, guided and objective inquiry into the question of obscenity *vel non* of the films. We have only the conclusory assertions of obscenity by the law enforcement officers, a procedure condemned in the case of *Lee Art Theatre v. Virginia, supra.*

Assuming for the sake of argument that the affidavits together

with the exhibits as presented to the Judge in this matter did establish "probable cause" to search for the two films, we still contend that the seizure of the "various documents, lists, labels, business records and books" listed in the inventory were improperly seized and thus the fruits of an illegal search and seizure and must be suppressed.

The search warrant in the case at bar provided in pertinent part for the seizure of "all books and records which are evidence of the violation of Florida Statute 847.07(4)(c)." The authroization to seize said books and records did not particularize what books and records were to be seized pursuant to the warrant, and thus left ot the investigators executing the search warrant, the discretion to decide for themselves what books and records were evidence of the violation of the applicable Florida law.

The Fourth Amendment provides in pertinent part as follows:

> "particularly describing the place to be searched, and the persons or things to be seized."

In *Stanford v. Texas*, 379 U.S. 476, the United States Supreme Court reversed a finding of the lower Court which allowed a Texas Judge to issue a search warrant authorizing the seizure of all items" . . . unlawfully possessed in violation of Article 6889-3 and to take possession of same." The high Court stated:

> "In short, what this history indispensible teaches is that the constitutional requirement that warrants n ast particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude . . . the constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case."

This search, conducted without probable cause, and in violation of Petitioners' Fourth Amendment rights to freedom from such unreasonable intrusions falls squarely within those cases that require exclusion of the evidence. Failure to supress such evidence is grounds for reversal of the trial Court verdict. *Mapp, supra; Stone,* 428 U.S. 465 90 Sup. Ct. 3037 (1976); *Linkletter v. Walker,* 381 U.S. 618 85 Sup. Ct. 1731 (1965); *Terry v. Ohio,* 382 U.S. 1, 88 Sup. Ct. 1868 (1968); and, *U.S. v. Calandra,* 414 U.S. 338 94 Sup. Ct. 613 (1974).

CONCLUSION

For the foregoing reasons, a Writ of Certiotari should issue to review the judgment and order of the Fourth District Court of Appeals.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq
16133 Ventura Boulevard
Penthouse Suite E
Encino, California 91436

213/981-9421
Attorney for Petitioners

Of Counsel:

Bruce L. Randall
4902 North Federal Highway, Suite 480
Ft. Lauderdale, Florida 33308

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1981

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

78-2027, 78-2028, 78-2029, 78-2030, 78-2031, 78-2032.

MICHAEL LOCHIATTO, CHERYL ROGERS a/k/a CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME and ANTHONY BATTISTA,
Appellants,
vs.
STATE OF FLORIDA
Appellants,

Decision filed February 11, 1981

Consolidated appeals from the Circuit Court for Broward County; Miette K. Burnstein, Judge.

Bruce L. Randall, Fort Lauderdale, and Robert Eugene Smith, Encino, California, for Appellants.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, West Palm Beach, for Appellee.

PER CURIAM.

AFFIRMED.

LETTS, C.J., ANSTEAD and BERANEK, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

78-2027, 78-2028, 78-2029, 78-2030, 78-2031, 78-2032.

MICHAEL LOCHIATTO, CHERYL ROGERS a/k/a CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME and ANTHONY BATTISTA,
Appellants,
vs.
STATE OF FLORIDA
Appellants,

March 12, 1981

BY ORDER OF THE COURT:

ORDERED that the Motion for Rehearing filed February 25, 1981 by Appellants is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH, CLERK

cc: Bruce L. Randall, Esq.
Robert Eugene Smith, Esq.
Joy B. Shearer, Assistant Attorney General

cms

APPENDIX C

CONSTITUTIONAL and STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . obridging the freedom of speech, or the press. . . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

3. The pertinent provisios of the Fifth Amendment are:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

4. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws.

STATE STATUTES

5. The pertinent provisions of the F.S.A. 847.07(1) reads as follows:

"A person commits the offense of distributing obscene materials when knowing the obscene nature thereof, he sells, rents, leases, exhibits, or otherwise disseminates to any person any obscene material of any description or who offers to do so, or who possesses such material with the intent to do so." Misdemeanor in the First Degree.

6. The pertinent provisions of F.S.A. 847.07(4)(c) reads as follows:

*". . . that any person who knowingly wholesale promotes any obscene matter or in any manner knowingly hires, employs, uses or permits any person to wholesale promote or assist in wholesale promoting any obscene matter is guilty of a felony of the third degree which is punishable by up to five years in the State Prison.**

*Wholesale promote means to provide, deliver, transfer, distribute, circulate, disseminate, or offer or agree to do the same, with or without consideration, for purposes of redistribution."

Office-Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2114

IN THE
SUPREME COURT OF THE UNITED STATES
October term, 1980

MICHAEL LOCHIATTO, CHERYL ROGERS A/K/A CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME, ANTHONY BATTISTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

JIM SMITH
Attorney General
Tallahassee, Florida

JOY B. SHEARER
Assistant Attorney General
111 - Georgia Avenue,
Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

QUESTIONS PRESENTED

I.

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD ASSUME JURISDICTION OVER THE INSTANT CASE ON THEIR CLAIM THAT THE FLORIDA OBSCENITY STATUTE AS CONSTRUED BY THE STATE SUPREME COURT IS UNCONSTITUTIONAL AND IN CONFLICT WITH MILLER v. CALIFORNIA, 413 U.S. 15 (1973)?

II.

WHETHER THE PETITIONERS HAVE SHOWN THE STATE COURTS FAILED TO REQUIRE THE RESPONDENT TO ESTABLISH SCIENTER IN ITS PROSECUTION OF THEM FOR PROMOTING AND DISTRIBUTING OBSCENE MATERIAL, CONTRARY TO CONTROLLING PRECEDENT?

III.

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THEIR CONTENTION THAT THEIR RIGHTS WERE VIOLATED BY A SEARCH AND SEIZURE CONDUCTED PURSUANT TO A WARRANT, PARTICULARILY SINCE: (a) THE CHALLENGE TO THE SEIZURE OF THE THREE HUNDRED FILMS WAS NOT MADE BELOW; and (b) THE ONLY PETITIONER TO SHOW STANDING WAS LOCHIATTO?

I N D E X

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii,iii
TABLE OF CITATIONS	iv,v,vi
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	1
STATEMENT OF THE CASE	2-4
ARGUMENT AGAINST GRANTING THE WRIT.	5-23
I. THE DEFINITION OF OBSCENITY SET FORTH IN FLA. STAT.847.07, AS AUTHORITATIVELY CONSTRUED BY THE FLA. SUPREME COURT, IS CONSTITUTIONAL AND CONSISTENT WITH THE STANDARDS SET BY THIS COURT.	5-10

Table of Contents (cont'd) PAGE

II. THIS COURT'S REQUIREMENT THAT THE GOVERNMENT ESTABLISH SCIENTER IN A PROSECUTION FOR PROMOTING AND DISTRIBUTING OBSCENE MATERIAL IS FOLLOWED IN FLORIDA AND SUCH EVIDENCE WAS PRESENTED IN THE PETITIONERS' TRIAL 11-14

III. THE TRIAL COURT'S DENIAL OF THE PETITIONERS' MOTIONS TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO A VALID SEARCH WARRANT AND THE STATE APPELLATE COURT'S AFFIRMANCE THEREOF WERE CONSISTENT WITH ESTABLISHED PRECEDENT. 15-23

CONCLUSION 24

CERTIFICATE OF SERVICE. . . . 25

APPENDIX "A" . . . . . A-1 - A-4

APPENDIX "B" . . . . . A-5 - A-10

TABLE OF CITATIONS

Cases

PAGE

Cohen v. State,
125 So. 2d 590 (Fla. 1961). . . 12

Crossley v. State,
200 So. 2d 640
(2nd DCA Fla. 1967) 2

Ellwest Stereo Threaters, Inc.v.
Nichols, 403 F. Supp.857
(M.D.Fla. 1975) 21

First Amendment Foundation of
Fla.Inc. v. State,
346 So. 2d 450 (Fla. 1978) . . 6,7

Hamling v. United States,
418 U.S. 87 (1974) 12

Jones v. United States,
362 U.S. 257 (1960) 4

Katz v. United States,
389 U.S. 347 (1967) 16

Miller v. California,
13 U.S. 15 (1979) i,5,8

M.B.F.Theatres,Inc. v. State,
368 So. 2d 347 (Fla. 1979). . . .7

Mishkin v. New York,
383 U.S. 502 (1966) 14

Page

Paris Adult Theatre v. Slaton,
413 U.S. 49 (1973). 6

Shifrin v. State,
210 So. 2d 18
(3rd DCA Fla. 1968) 2

Smith v. California,
361 U.S. 147 (1959). 11

Spinelli v. United States,
393 U.S. 410 (1969). 20

Stanford v. Texas,
397 U.S. 476 (1965). 22

State v. Aiuppa,
298 So. 2d 391
(Fla. 1974) 6,7,8,9

State v. Muzevsky,
388 So. 2d 21
(4th DCA Fla. 1980) 18

State v. Paris Adult Theatre,
210 S.E. 2d 456
231 Ga. 312 (173) 6

United States v. Middleton,
599 F. 2d 1349
(5th Cir. 1979). 21

United States v. Salvucci,
U.S.__, 65 _.Ed 2d 619
(1980) 17

Page

United States v. Torch,
609 F. 2d 1988
(4th Cir. 1979) 18,20

Ward v. Illinois,
431 U.S. 767 (1977) . . . 10

Statutory Provisions

Chapter 847, Fla.Stat.. . . . 19

Section 847.07(1), Fla.Stat. . . 12

Section 847.07(2), Fla.Stat. . . 1,5,6,8

Section 847.07(4)(c), Fla.Stat.. .12,21

Rules of the USSC

Rule 21 (1)h 16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by the Petitioners, Respondent submits:

Fla.Stat.847.07(c). Considered as a whole and applying community standards, material is obscene if:

(1) Its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion;

(b) It is utterly without redeeming social value, and

(c) In addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

STATEMENT OF THE CASE

Respondent accepts the Petitioners' statement of the case subject to the following corrections:

The record on appeal filed in the State appellate court reflects that only Petitioners Lochiatto and Rogers a/k/a Long filed motions to dismiss which challenged the constitutionality of Fla.Stat.847.07 (R 1782-1783; 1787-1789; 1794-1797). Therefore, by failing to raise the issue in the trial court, the other Petitioners waived their right to challenge the constitutionality of the statute on appeal. Shifrin v.State, 210 So. 2d 18 (3rd DCA Fla. 1968); Crossley v. State, 200 So. 2d 640 (2nd DCA Fla. 1967). The Respondent pointed this out in its

Brief of Appellee filed in the Fourth District Court of Appeal (Appellee's brief, page 9, ¶1.)

The matter of the seizure of the three hundred (300) additional films from the warehouse was not, contrary to Petitioners' statement, raised in the Petitioners' pretrial motions to suppress, which challenged only the adequacy of the search warrant and underlying affidavit (R 1825-1829). In fact, the seizure of the three hundred (300) films was consented to by Joseph Cassaro, a trial defendant who was not a party to the appeal, and who was the only defendant present when the warrant was executed. The Petitioners never contested the validity of the seizure of these films in the Courts below, at

either the trial or appellate level. (See Respondent's Appendices A and B; Initial Brief of Appellant, Point III). Additionally, the Respondent challenged the Petitioners' standing to contest the search of the warehouse in the lower courts, arguing that only Petitioner Lochiatto, as lessee of the premises, could claim a Fourth Amendment interest (Appellee's brief pp. 21-23). The Petitioners relied on the automatic standing rule of Jones v. United States, 362 U.S. 257 (1960). (Initial brief of Appellants' pp. 22-23).

ARGUMENT AGAINST GRANTING THE WRIT

I.
THE DEFINITION OF OBSCENITY SET FORTH IN FLA.STAT.847.07, AS AUTHORITATIVELY CONSTRUED BY THE FLORIDA SUPREME COURT, IS CONSTITUTIONAL AND CONSISTENT WITH THE STANDARDS SET BY THIS COURT.

The Petitioners contend that Fla. Stat. 847.07 is over broad and in contravention of the obscenity standards announced by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973). The "Miller test" of obsenity is three pronged: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work describes or deplicts in a patently offensive way, sexual conduct specifically

defined by the applicable state law; (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. The Florida Supreme Court, in State v. Aiuppa, 298 So. 2d 391 (Fla. 1974) authoritatively construed Fla.Stat.847.07 and found it met the Miller test, noting that the Florida Statute is substantially the same as the Georgia Statute in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) which was construed and upheld by the Georgia Supreme Court on remand, State v. Paris Adult Theatre,201 S.E. 2d 456, 231 Ga.312(1973). The Florida Supreme Court subsequently held in First Amendment Foundation of Fla.Inc. v. State,364 So. 2d 450 (Fla. 1978) that the statute as construed in Aiuppa

is authoritative and it does meet the Miller test. These two decisions (Aiuppa and First Amendment Foundation) were reaffirmed in M.B.F. Theatres, Inc. v. State, 368 So. 2d 347 (Fla. 1979).

This construction of the Statute by the Florida Supreme Court was not an improper usurpation of the legislative function, as the Petitioners suggest. In its Aiuppa opinion, the Court noted its responsibility to resolve doubts as to the constitutionality of a statute in favor of its validity, and held that since it was clear the legislative intent was to regulate the depiction or description of sexual conduct, the Court considered it was not rewriting the statute, but reasonably construing it, consistent with the

legislative intent. See 298 So. 2d at 396-397. This judicial construction was authorized by the Miller v. California opinion, which specifically provided that judicial construction of a statute may be considered with the statute to determine its constitutionality:

> [States can regulate] works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. 413 U.S. at 24 (Emphasis supplied).

Therefore, the Florida Supreme Court's construction of Fla.Stat.847.07 was clecrly permitted by the Miller decision.

The Florida obscenity statute, as construed in State v. Aiuppa, supra, was sufficient to put the Petitioners

on notice as to what conduct was prohibited. The indictments in the instant case specified the nature of the material distributed by the Petitioners:

> Said films graphically depict and show patently offensive "hard core" pornographic repredentations of ultimate sexual acts or physical conduct, normal or perverted, actual or simulated, to wit: nude and semi nude male and female persons actually engaging in sexual conduct, including sexual intercourse, sodomy, cunnilligus, and fellatio. . . (R 1780; 1784-1785).

This material is the type that is specifically prohibited by the statute as construed in State v. Aiuppa, supra. Thus, the prohibited conduct is sufficently described, the Petitioners' material came within that description, and so the claim that the statute is unconstitutionaly vague is without merit.

The Florida Supreme Court's construction of the State obscenity statute was proper and clearly consistent with the opinions of this Court. Miller v. California, supra, 413 U.S. at 24; Ward v. Illinois, 431 U.S. 767 (1977). Therefore, the application of this statute to the Petitioners was constitutionally permissible and in affirming their convictions, the Court of Appeal did not create confict with prior decisions of this Honorable Court.

II.

THIS COURT'S REQUIREMENT THAT THE GOVERNMENT ESTABLISH SCIENTER IN A PROSECUTION FOR PROMOTING AND DISTRIBUTING OBSCENE MATERIAL IS FOLLOWED IN FLORIDA AND SUCH EVIDENCE WAS PRESENTED IN THE PETITIONERS' TRIAL.

The United States Supreme Court held in Smith v. California, 361 U.S. 147 (1959) that obscenity statutes must contain an element of scienter because a "strict liability" standard in such statutes would work as a substantial restriction of freedom of the press. Although declining to give a specific definition, the Court did note that scienter could be proved by circumstantial evidence: "the circumstances may warrant the inference that [a defendant] was aware of what a book contained, despite his denial" 361 U.S. at 154. The Court subsequently held in Hamling v.

United States, 418 U.S. 87 (1974), that it is constitutionally sufficient for the prosecutor to show that a defendant had knowledge of the contents of the materials and knew the nature and character of the materials.

The requirement of scienter is incorporated into the Florida Statutes, which specifically require that the person charged "know [ ] the obscene nature" of the materials he distributed, Fla. Stat. 847.07(1), and that he "knowingly" promoted "obscene matter". Fla. Stat. 847.07(4)(c). The Florida Appellate Courts' decisions in this area are likewise consistent with those of the United States Supreme Court. For example, in Cohen v. State, 125 So. 2d 590 (Fla.1961), the Court held that the prosecutor must prove an accused had knowledge of the

obscene character of the documents or articles involved.

In their Petition, as they did in the Court of Appeal, the Petitioners make broad assertion that the State failedto prove scienter without discussing the evidence presented at their trial. On the contrary, the State adduced extensive evidence at trial showing the general nature of the enterprise the Petitioners were involved in, as well as evidence pertaining to each Petitioner individually. This evidence was discussed in the Respondent's Answer Brief on direct appeal and clearly accepted as sufficient by the State Appellate Court. (Answer brief of Appellee, pp.15-19). Suffice it to say that the State established the Petitioners were individually

and collectively involved in the business of promoting and distributing obscene films and they were clearly aware of the nature and contents of their stock in trade. The evidence was similar to the type found sufficient by this Court in Mishkin v. New York, 383 U.S. 502 (1966).

Therefore, in affirming the Petitioners' convictions, the State Court of Appeal applied the proper standard and did not create confict with the decisions of this Court.

III.

THE TRIAL COURT'S DENIAL OF THE PETITIONERS' MOTIONS TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO A VALID SEARCH WARRANT AND THE STATE APPELLATE COURT'S AFFIRMANCE THEREOF WERE CONSISTENT WITH ESTABLISHED PRECEDENT.

The Petitioner's contention that the seizure of three hundred films(300) during the search of a warehouse was an unconstitutional prior restraint was never argued in the Courts below.The Petitioners were told at the Motion to Suppress hearing that the three hundred films would not be introduced at their trial, but would be referred to by type (Appendix A). At trial, it was established that the films were seized

pursuant to the consent[1] of a trial defendant who was present when the warrant was executed, and defense counsel agreed that the films would be referred to as "sexually explicit" (Exhibit B). These films were not introduced at trial, and the reference to their nature was for purposes of showing scienter. Having made no objection to the constitutionality of the seizure of these films in the State courts, the Petitioners are estopped from raising one now, for the Rules of this Court, Rule 21(1)(h), clearly require that the federal question must have been timely and pro-

(1) Which is a recognized exception to the Fourth Amendment warrant requirement, e.g., Katz v. United States, 389 U.S. 347, n.22 (1967), and probably explains the lack of objection below.

perly raised in the State court system in order to give this Court certiorari jurisdiction. Therefore, Petitioners' argument at pages 20 -22 of the Petition concerning the three hundred films must be disregarded.

Furthermore, the Petitioners, with the exception of Petitioner Lochiatto who was a lessee of the premises, do not have standing to object to the search. The automatic standing rule of Jones v. United States, 362 U.S. 256 (1960), relied on by the Petitioners below, has, in the interim been abolished by this Court's decision in United States v. Salvucci, __ U.S. __, 65 L.Ed. 2d 619 (1980). Florida has since recognized and applied the Salvucci decision. See e.g.,State v. Muzevsky, 388 So. 2d 21

(4th DCA Fla. 1980). There was no evidence that any of the Petitioners other than Lochiatto had a privacy interests in the premises searched, a warehouse. None of them were present at the time of the search, and although they distributed materials obtained from the business, Spectrum Design, only Petitioner Battista asserted any proprietary interest in the business (R 1809). Therefore, the Petitioners' Fourth Amendment rights were not impinged by the search so they lacked standing to challenge its validity. Compare, United States v. Torch, 609 F. 2d 1088 (4th Cir. 1979).

Even if the Petitioners had standing, their attack on the search warrant is without merit, and thus the Court of

Appeal properly affirmed the trial court's denial of the Motions to Suppress. The affidavit underlying the search warrant was sufficient to present probable cause upon which the Magistrate could determine that the films "Emergency Nurse" and "Venture in Bizarre" were obscene. The affidavit included as an attached exhibit an "Order of Determination of Probable Cause of Obscenity" signed by Circuit Judge John Moore. This order stated that the Judge had received the affidavit of Robert Rigia (a police detective) and upon reviewing it, found probable cause to believe the films were obscene under the purview of Chapter 847 of the Florida Statutes (SR). The Rigia affidavit contained a scene-by-scene description of the films' con-

tents, and this fact was stated in the probable cause affidavit (SR).

This Court has held that an applicant for a search warrant does not have to have direct knowledge of all the facts alleged, and may include reliable hearsay information in his affidavit. Spinelli v. United States, 393 U.S. 410 (1969). The information pertaining to the films' obscenity in the instant case- a judicial order finding probable cause to believe the films were obscene based on a written scene-by-scene description of the films supplied by a police officer who had viewed them- was certainly reliable. The procedure of a magistrate reviewing a police affidavit describing films and finding probable cause that they are obscene has been specifically

approved in lower federal courts. United States v. Middleton, 599 F. 2d 1349 (5th Cir. 1979); Ellwest Stereo Theatres Inc. v. Nichols, 403 F. Supp. 857 (M.D.Fla. 1975).

The Petitioners' other objection to the warrant is that it allegedly did not state with sufficient particularity the items to be seized because in addition to the films "Emergency Nurse" and "Venture in Bizarre", the police were directed to seize "all books and records which are evidence of the violation of Fla.Stat.Section 897.07(4)(c)". The Respondent maintains the language was sufficient because the statute cited prohibits wholesale promotion of obscene matter. Wholesale promotion is defined in the statute as follows:

> to manufacture, issue, sell, provide, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or offer or agree to do the same with or without consideration, for purposes of resale or redistribution.

Clearly then, the warrant was describing the business records that would show the Petitioners were involved in wholesale promotion of obscenity. Business records of this type aren't entitled to the same First Amendment consideration as the obscene material itself. United States v. Torch, 609 F. 2d 1088 (4th Cir. 1979); Stanford v. Texas, 379 U.S. 476, 485 n.16 (1965). Accordingly, the generic description was sufficient. Thus, the Petitioners have failed to establish that their constitutional claims were incorrectly ruled on by the State courts. The affirmance of the trial

court's denial of their Motions to Suppress by the State Appellate Court was consistent with constitutional principles and the decisions of this Honorable Court.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court DECLINE to assume jurisdiction in this case and DENY the Petitioners' Application for a Writ of Certiorari.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

JOY B. SHEARER
Assistant Attorney General
Elisha Newton Dimick Bldg.
111 - Georgia Ave. R-204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari has been furnished this ____ day of September, 1980, to ROBERT EUGENE SMITH, ESQ., Counsel for Petitioners, 16133 - Ventura Boulevard, Penthouse E, Encino, California 91436, by U.S. Mail.

Of Counsel

APPENDIX "A"

EXCERPT FROM TRIAL COURT HEARING ON THE DEFENSE MOTION TO SUPPRESS, HELD DECEMBER 2, 1977.

[DEFENSE COUNSEL]:
Judge, while we're all gathered together, maybe we can address ourselves to another point. At the time of the search at the warehouse there was obtained approximately 300 additional films under circumstances which Mr. Vinikoor and I probably would not agree as to the legal effects.

The question then is presented does Mr. Vinikoor intend to introduce those 300 hour long films in the trial of this case, and if so, of course, for whatever reason we want to be able to address ourselves by memorandum prior to trial to anticipate these problems so that the Court can rule on them.

[THE COURT]:
What are you planning on doing?

[PROSECUTOR]:
That's a tough question. The State at this time does not intend to introduce into evidence the other films. However, the

State does anticipate making reference to the number of films found at that location.

[DEFENSE COUNSEL]:
We would have less difficulty with that, Your Honor.

[THE COURT]:
All right, then we shouldn't have any problems.

[PROSECUTOR]:
I certainly don't anticipate. If the State changes its position with regard to the introduction of evidence, counsel will be given adequate notice that they can make the appropriate motions to the Court.

[DEFENSE COUNSEL]:
Upon the response to discovery where indicated the evidence to be used, you've said sixteen millimeter film and eight millimeter film. The eight millimeter films would be films of surveillance.

[PROSECUTOR]:
That's correct. There are no suspected pornographic films that are part of this case.

[DEFENSE COUNSEL]:
They're all pornographic.
They're not all obscene.

[PROSECUTOR]:
Can I approach you on that, counsel?

[THE COURT]:
Are the only films that you're talking about this Emergency Nurse thing and the Bizarre?

[PROSECUTOR]:
That's correct. Those are the two films named in the indictment that the State intends to use.

[DEFENSE COUNSEL]:
When I make reference to the films.- - -

[PROSECUTOR]:
Well, try not to use the words obscene. There will be reference to the explicitness of the films.

[DEFENSE COUNSEL]:
That's a different story then.

[PROSECUTOR]:
So if that presents a problem, you are now put on notice that's the State intention and you may file whatever motions you wish.

[DEFENSE COUNSEL]:
That's not a problem.

[THE COURT]:
"Exceptionally explicit" will be the terminology.

(R 20-22).

A P P E N D I X "B"

EXCERPT OF TRIAL TESTIMONY OF INVESTIGATOR HOLLOWAY HELD MARCH 2, 1978.

Q [BY PROSECUTOR]: Now, Mr. Holloway, would you tell the jury, please, how many films you removed from the warehouse pursuant to the search warrant?

A. Two.

Q. And did you remove films other than those two films from the warehouse on July 26th?

A. Yes.

Q. Was that pursuant to the consent of Mr. Cassaro [a co-defendant at trial who was not one of the Appellants below] as you testified earlier?

A. Yes, it was.

Q. How many films did you remove from the warehouse pursuant to Mr. Cassaro's consent?

A. Approximately three hundred.

Q. And were all of these films sixteen millimeter film or were they different?

A. No, there were some sixteen millimeter full length film, some thirty five millimeter full length film. There were utitled films. There were some what they call "Trailers" which are coming attractions of other films.

Q. Did you have an opportunity to personally view any of the films that were taken on that day?

A. Yes, I did.

Q. Of the ones that you personally viewed, how many esplicitly depicted sexual acts?

[DEFENSE COUNSEL]:
Objection, Your Honor.

I think we've discussed this matter at some length and I think that Mr. Vinikoor is going beyond what I understood Your Honor's ruling to be.

Further, Your Honor, this witness isn't qualified to testify about some films that are not in evidence, whatever the contents of those films are.

[THE COURT]:
I honestly don't remember. Come on up.

(Thereupon, the following proceedings were had outside the hearing of the jury:)

[THE COURT]:
I thought we stipulated to it.

[PROSECUTOR]:
Judge, the memory of defense counsel is phenomenally short lived.

[THE COURT]:
I thought --

[PROSECUTOR]:
Not only did they stipulate to it but they agreed so long as I used the language "sexually explicit". We agreed way back on the Motion to Suppress.

[THE COURT]:
That was my understanding.

[DEFENSE COUNSEL]:
I am not arguing.

[PROSECUTOR]:
It's always the same two that are arguing.

[THE COURT]:
That's what I thought. I really did. Was I mistaken?

[DEFENSE COUNSEL]
Your Honor, we had previous discussions today concerning the films that were seized and the films that were taken and how we were going to relate to this and the Court indicated that we would--there were films I agreed that there was a consent for the taking of films. That's all I agreed to. Now, he's asking this witness how many of the films viewed contained sexually explicit acts. That calls for a conclusion from this witness. The only way that we can introduce that is through the films.

[THE COURT]:
He can describe what the sexual acts--

[DEFENSE COUNSEL]:
We're talking about best evidence, Your Honor, day in and day out and the best evidence is the films.

[THE COURT]:
We could either have him describe what was in the films or we can have him refer to it as having sexual content or sexually explicit whatever. You decide to do one of those things. You have to pick.

[DEFENSE COUNSEL]:
We object to that, putting us in that position but obviously if we have to choose one or the other, we'll agree to sexually explicit. However, I think that he's not qualified to testify to that.

[THE COURT]:
If you'd rather, we can go back and have him describe the sexual acts but it was my understanding we had agreed this would be the verbiage used.

[DEFENSE COUNSEL]:
As long as the record reflect my objection that the films speak for themselves and the best evidence are those films. They are not the films that are charged in this indictment, that any discussion of those films is completely irrelevant to this case, and, number two any of those descriptions of those films, by the way, is not proper because it's not the best evidence; as long as my objection is noted.

[THE COURT]:
Okay, go ahead. The language preferred is sexually explicit.

[THE PROSECUTOR]:
The question was proper.

(Thereupon, the following proceedings were resumed in the hearing of the jury:)

Q. I repeat the question, Mr. Holloway, how many of the films that you saw explicitly depicted sexual acts.

A. All of them.

(R 308-311).